

**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

**In re: Petition for Approval of Standard)
Offer Contract for Purchase of Firm) Docket No. 070235-EQ
Capacity and Energy from Renewable) Filed: September 5, 2007
Energy Producer or Qualifying Facility Less)
than 100 kW Tariff, Progress Energy)
Florida, Inc.**

**PCS PHOSPHATE – WHITE SPRINGS’
RESPONSE TO MOTION TO STRIKE
OF PROGRESS ENERGY FLORIDA**

Pursuant to Section 28-106.204, Florida Administrative Code, White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate - White Springs (“PCS Phosphate”) files this response to the Progress Energy Florida, Inc. (“PEF”) Motion to Strike Portions of PCS Phosphate’s Petition to Intervene and Protest (“Motion to Strike”), filed in this matter on August 29, 2007, and states:

1. Chapter 366.91, Florida Statutes, enacted in 2005, announced a policy “to promote the development of renewable energy resources in the state. Renewable energy resources have the potential to help diversify fuel types to meet Florida’s growing dependency on natural gas for electric production, minimize the volatility of fuel costs, encourage investment within the state, improve environmental conditions, and make Florida a leader in new and innovative technologies.”
2. PCS Phosphate has made significant investments in its White Springs, Florida mining and chemical production facilities to capture the heat produced by its sulfuric acid manufacturing process to generate substantial amounts of electricity with no incremental greenhouse gas emissions. This alternative energy production method is a specific type

of renewable energy resource that Florida seeks to promote.¹

3. Pursuant to 366.91(3), Fla. Stats., the Commission adopted rules to implement Florida's renewable energy policy, including rules relating to utility standard offer contracts to purchase capacity and energy from renewable energy producers.²
4. The applicable rule with respect to standard offer contracts, Rule 25-17.250 F.A.C., specifies that utilities shall develop a menu of standard offer payments based on avoidable fossil-fired generating units identified in the utility's Ten Year Site Plans ("TYSP"), or, if applicable, a planned power purchase.³ Thus, the planned generation and purchase power additions contained in a utility's TYSP are essential resources for determining the reasonableness of proposed Standard Offer Contract terms.
5. On April 2, 2007, PEF filed its petition for approval of its new standard offer contract to purchase capacity and energy from renewable energy and small qualifying facilities. The proposed standard offer contract includes the menu of capacity and energy payments required by Rule 25-17.250 as well as numerous non-price contractual provisions that are not required by any Commission rule.
6. By order dated June 11, 2007, the Commission approved PEF's proposed standard offer contract.⁴ As provided by the PAA Order (at page 5) and Rule 28-106.201, F.A.C., interested parties may file a protest and seek a hearing concerning all particulars of the standard offer contract. This is the first, and only, opportunity for

¹ 366.91(2)(b), Fla. Stats.

² Rules 25-17.082 and 25-17.200 through 25-17.310, F.A.C.

³ Rule 25-17.250(1), F.A.C..

⁴ Order No. PSC-07-0493-TRF-EQ ("PAA Order").

consumers and renewable energy producers to be heard on these issues. In fact, all disputed issues of law and fact must be raised at this point or they may be deemed to be waived.⁵ This means both that the Commission has exclusive jurisdiction to address all standard offer contract issues, and that it has a corresponding obligation to entertain all issues germane to the standard offer contract that are timely presented in a protest.

7. On July 2, 2007, PCS Phosphate filed its Protest and Petition to Intervene (“PCS’ Protest”) that is the subject of PEF’s instant motion to strike. The PCS Protest challenges the content of PEF’s Standard Offer Contract. The relief PSC Phosphate seeks are appropriate and necessary changes to the Standard Offer Contract. PCS Phosphate does not request revisions to any law or Commission rule in this Protest. The Protest specifically lists features of the Standard Offer Contract that must be further examined or changed, disputed issues of law and fact, and provides the ultimate facts alleged as they relate to the standard offer contract. Each allegation in PCS’ Protest, as addressed below, complies in all relevant respects with the requirements of Rule 28-106.201, F.A.C.
8. Also on July 2, 2007, the Florida Industrial Cogenerators Association (“FICA”) filed a petition in this docket and in the dockets for the standard offer contracts of several other Florida investor-owned utilities (“IOUs”).
9. On July 23, 2007, PEF and the other Florida IOUs filed a motion for a more definitive statement, or in the alternative, a motion to dismiss FICA’s petition. In the Motion to Dismiss, the IOUs argued that FICA failed to satisfy Rule 28-106.201

⁵ Rule 25-22.029(3), F.A.C.

of Florida's Administrative Code because it failed to "identify the 'specific facts' that it contends 'warrant reversal or modification of the agency's proposed action.'"⁶

10. In its recommendation memo on the IOUs' Motion to Dismiss, Staff stated it "believes that FICA's Petition fails to meet the requirements of Rule 28-106.201" and thus "recommend[ed] that FICA's Petition be dismissed without prejudice."⁷ Staff further stated that FICA's allegations "seem[ed] to generally take issue with the Commission's policy on renewable standard offer contracts."⁸ The IOU's Motion to Dismiss was considered by the Commission at its August 28, 2007 meeting. The Commission granted the IOUs' alternative motion to dismiss without prejudice, as Staff recommended.

11. Relying solely on a comment in the Staff recommendation memo that "broad-based challenges to Commission policy are inappropriate in this docket,"⁹ PEF, by motion dated August 29, 2007, moved to strike all or a portion of paragraphs 6, 7, 9, 10, 11, 12, 14, 16, 17, 18, 19, 20 and 21 of PCS' Protest. With virtually no elaboration or reference to legal authority, PEF alleges that the selectively quoted selections of PCS' Protest are "inappropriate" for this proceeding.¹⁰ As explained below, PEF's Motion to Strike is legally unsupported, procedurally flawed and substantively meritless.

12. Unlike the IOUs' Motion to Dismiss the FICA Petition, which at least alleged that FICA's petition was not in compliance with the Commission's pleading requirements for a protest, PEF's motion does not allege that PCS' Protest fails to comply with any express Commission rule or implied requirement. Neither does the

⁶ IOUs' Motion to Dismiss at p.2, ¶5.

⁷ Docket Nos. 070232-EQ, 070234-EQ, 070235-EQ, 070236-EQ, Staff recommendation memo, p.6.

⁸ *Id.* at p.7

⁹ Motion to Strike at p. 1, ¶2 (referencing Staff recommendation memo at pp. 7-8).

¹⁰ *Id.* at p.2, ¶4.

motion claim that the disputed issues or ultimate facts alleged by PCS Phosphate are in any way irrelevant to the reasonableness of the PEF Standard Offer Contract for purchasing renewable energy. PEF similarly offers no statutory, case law or Commission rule to justify its motion to strike. Rather, the sole premise for the utility's motion to strike stems from PEF's expressed view that:

[like FICA] PCS Phosphate also raises issues concerning whether PEF's Standard Offer Contract will promote renewable energy production. These allegations go to the Commission's policy decisions in its rules, not to whether the Standard Offer Contract complies with the rules.¹¹

13. As noted above, the Staff recommendation concerning FICA involved an allegation that a protest did not contain sufficient detail necessary to comply with Rule 28-106.201. In contrast, in its Motion to Strike much of PCS' Protest, PEF, in an ironic twist, alleges that PCS Phosphate pleads too many issues. PEF never asserts (nor could it reasonably do so) that the PCS Protest did not fully describe the specific issues and ultimate facts that may warrant reversal of the proposed agency action. Thus, PEF's attempt to impose an impermissibly vague and non-authoritative legal analysis in terms of the proper scope of a protest should be rejected.

14. The purpose of a Protest is to define the factual and legal issues in dispute as well as the ultimate facts upon which necessary findings of fact and law should be rendered. Thus allegations that price and non-price terms of the Standard Offer Contract are unjust and unreasonable¹² involve issues of fact to be examined. Similarly, an allegation that the sum of the terms proposed in the Standard Offer Contract are unnecessary, onerous and

¹¹ *Id.* at p.3, ¶5.

¹² *See e.g.*, PCS' Protest, ¶¶ 6, 7, 9 and 10.

inconsistent with applicable State law¹³ properly defines issues of law and fact as well as ultimate facts to be decided. These allegations are absolutely essential to this docket and properly raised in the PCS Protest.

15. If endorsed by the Commission, PEF's motion would effectively bar interested parties from raising issues that are directly relevant to the terms and conditions of the Standard Offer Contract but are not explicitly referenced in the Commission's Rules. To offer an example, PCS Phosphate raised questions regarding several provisions that are particularly unwarranted and onerous.¹⁴ Most of those provisions in the PEF Standard Offer Contract are not required, or mentioned, by the Commission's applicable rules.¹⁵ Thus, the ultimate issue for Commission consideration is whether those terms contained in the Standard Offer Contract are just, reasonable and consistent with State law and policy. PEF seeks to strike the paragraphs in PCS' Protest that raise precisely these questions.¹⁶ PEF may have a different perspective to offer on these questions, but that merely demonstrates the existence of disputed material factual and legal issues. These particular issues are not inappropriate for or beyond the scope of this docket, but are exactly the issues that the Commission should examine, and this is the only forum in which the provisions of the Standard Offer Contract are subject to regulatory scrutiny before they are applied to every renewable energy supplier seeking to contract with PEF.

16. PEF's Motion to Strike fails to establish that the challenged sections of PCS' Protest are beyond the scope of this proceeding. First, despite its vague and generic reliance on the

¹³ Chapter 366.91, Fla. Stats.

¹⁴ See, e.g., PCS' Protest at ¶16(a) (discussing PEF's right to unlimited access to a renewable energy supplier's facility) and ¶16(b) (discussing the unreasonable time constraints placed on new renewable energy projects to obtain necessary permits and contracts, including permissions from PEF).

¹⁵ See, e.g., Rule 25-17.250, F.A.C..

¹⁶ See Motion to Strike at p. 4-5, referencing PCS Protest, ¶¶14, 16, 19, 20, 21.

Staff recommendation memo discussing the need for FICA to provide more detail in its pleading, PEF fails to provide any specific arguments for explaining why each of the referenced sections of PCS' Protest should be considered to be outside the scope of this docket and thus should be stricken. Indeed, PEF even objects to PCS' presentation of pure factual statements without any explanation for why those statements should be censored from the record.¹⁷ The Commission should reject PEF's Motion to Strike for failing to carry its burden of demonstrating precisely why each of the individual statements satisfy the standard for being stricken.

17. PEF's effort to equate PCS Phosphate's detailed list of the Standard Offer Contract's shortcomings with FICA's petition by claiming both FICA and PCS Phosphate question "whether PEF's Standard Offer Contract will promote renewable energy production" has no legal or factual foundation.¹⁸ PEF's use of this single, generic characterization as the basis to argue for the removal of most of PCS Phosphate's references to the promotion of renewable energy, PEF's TYSPs, and to the purpose of Florida's statutes and regulations is meritless. The utility should be required, and in this instance has failed, to demonstrate the basis for striking each element of the PCS Protest which PEF seeks to excise from Commission review.

¹⁷ See, e.g., Motion to Strike at p.3, ¶6 (attempting to strike PCS Phosphate's statements that:

This Standard Offer Contract is intended to implement Section 366.91, Fla. Statutes, which articulates an express state policy to promote renewable energy production [PCS' Protest, ¶6].

and

PEF's standard offer capacity payments are linked to the utility's decision first announced in its 2007 Ten Year Siting Plan ("TYSP") to abandon a planned coal-fired generation addition for 2013. PEF instead will rely on increased power purchases and natural gas-fired generation. This change in course shown in the 2007 TYSP will lead to a PEF system that gets 44% of its energy from oil- and gas-fired generation (compared to 32% today). [PCS' Protest, ¶7]

¹⁸ Motion to Strike at p.3, ¶5. Such a general and vague statement also does nothing to put PCS on notice as to what portions of the protest PEF finds objectionable. See IOUs' Motion to Dismiss at p.3, ¶7.

18. In its Protest, PCS Phosphate limited its objections to PEF's Standard Offer Contract and how that contract would comply with both the explicit and implicit terms of the governing statutes and regulations. To that end, PCS Phosphate's references to the promotion of renewable energy, PEF's TYSPs, and to the purpose of Florida's statutes and regulations were all presented in the context of PEF's Standard Offer Contract.
19. Of all of the statements challenged by PEF, the utility's attempt to remove all references in the PCS Protest to PEF's TYSP is the most vexing and unfounded, as the TYSP plays a critical role in some of the most important terms of the Standard Offer Contract. For example, the Commission's Rules specify the TYSP as the basis for determining capacity and energy payments to renewable energy producers.¹⁹ Indeed, the Commission has acknowledged the role of the TYSP, specifically noting in its proposed Order several of the material changes in PEF's TYSP from one year to the next.²⁰ The PCS Protest noted those changes, and particularly PEF's increased reliance on power purchases, as a material issue that should be explored in hearings regarding proposed payments under the Standard Offer Contract.²¹ Moreover, PCS' Protest does not challenge the TYSP process

¹⁹ Rule 25-17.250, F.A.C.

²⁰ PAA Order at p. 3. PEF's electric resource plan for the future is especially important in the context of the Standard Offer Contract, in that it has been in a considerable state of flux in recent years. As was explored at some length in Docket No. 070052-EI, *In re: Petition by Progress Energy Florida, Inc. to recover costs of Crystal River Unit 3 Uprate Through Fuel Clause*, PEF's 2005 TYSP projected roughly 900 MWs of natural-gas fired combined cycle generating capacity would enter commercial service in 2009 and 2011 (Hines Units 5 and 6). PEF 2005 TYSP, schedule 8. The utility's 2006 TYSP shows 1,500 MWs of new generating capacity from super-critical coal-fired generation slated for commercial operation in 2013 and 2014, with at least one of the new Hines units being eliminated. PEF 2006 TYSP, schedule 8. PEF's 2007 TYSP shows further, more dramatic changes. The most recent TYSP eliminates both Hines combined cycle units and the super-critical coal units. This planned generation construction has been replaced by 500 MWs of power purchases from Georgia, the 180 MW uprate of Crystal River Unit 3 and an unspecified natural gas combined cycle unit entering commercial service in 2013. PEF 2007 TYSP, schedule 8. *See* Docket No. 070052-EI, Tr. at 173-74 (testimony of PEF witness Waters). Given the constant shift in PEF's resource planning from reliance on natural gas to clean coal to power purchases, there are factual questions to address regarding the appropriate basis for avoided cost determinations.

²¹ PCS' Protest, at ¶¶7, 9, 10, 11, 12, and 17.

itself, but rather stressed the importance of the TYSP, and the unit choices contained therein, on the price terms (specifically capacity) in the Standard Offer Contract, a factor which unquestionably influences the development of, and participation by, renewable energy suppliers. Thus, PEF's attempts to remove from PCS' Protest any and all references to the TYSP are unwarranted. Indeed, with respect to encouraging participation by renewable suppliers, there can hardly be a more relevant or significant factual issue to resolve in order to effectuate the intent of Section 366.91, Florida Statutes.

20. In summary, PEF's Motion to Strike seeks to preclude any inquiry into the underlying premise for its standard offer capacity and energy payments, or, for that matter, for its proposed non-price terms and conditions. As such, the motion represents a fundamental misunderstanding of the Commission's role. The Commission should examine the content of all of the contractual provisions, ensure they are in the public interest, reasonable and fair, and further Florida's renewable energy policies.

21. For the reasons expressed above, PCS Phosphate respectfully requests that the Commission deny PEF's Motion to Strike.

Respectfully submitted this 5th day of September, 2007,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Response to Motion to Strike of Progress Energy Florida has been furnished by electronic mail and U.S. Mail this 5th day of September 2007 to the following individuals:

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